Supreme Court, U.S.
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No. 93-453

In The

# Supreme Court of the United States

October Term, 1993

ROY ROMER, as Governor of the State of Colorado, GALE NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

*Petitioners,*

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Did the Colorado Supreme Court err in affirming the entry of a preliminary injunction enjoining the operation and effectiveness of a citizen-initiated state constitutional amendment upon a finding that the amendment, to a reasonable probability, infringes on a fundamental right protected by the Equal Protection Clause of the United States Constitution and has not been shown at the current stage of the proceedings to be supported by a compelling state interest.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

Cases ..... iii

Constitutional Provisions ..... iii

Statutes/Ordinances ..... iii

CONSTITUTIONAL AND ORDINANCE PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 3

REASONS FOR DENYING THE PETITION ..... 6

THE DECISION CHALLENGED BY PETITIONERS DOES NOT CONSTITUTE A FINAL DECISION SUBJECT TO REVIEW UNDER SECTION 1257 OF TITLE 28 OF THE UNITED STATES CODE ..... 6

CONCLUSION ..... 8

APPENDIX ..... App. 1

# TABLE OF AUTHORITIES

Page

CASES

*ASARCO, Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989) ..... 6

*Cox Broadcasting Corporation v. Cohn*, 420 U.S. 478, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) ..... 6, 7

*Flynt v. Ohio*, 451 U.S. 619, 101 S.Ct. 1958, 68 L.Ed.2d 489 (1981) ..... 6, 7

*Local No. 438 v. Curry*, 371 U.S. 542, 83 S.Ct. 531, 9 L.Ed.2d 514 (1963) ..... 7

*Minnick v. California Department of Corrections*, 452 U.S. 105, 101 S.Ct. 2211, 68 L.Ed.2d 706 (1981) ..... 7

*Organization For A Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971) ..... 7

*Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945) ..... 6

CONSTITUTIONAL PROVISIONS

Colorado Constitution, Article II, §30b ..... 1, 3

United States Constitution, Amendment XIV, §1 ... 1, 4

STATUTES/ORDINANCES

Municipal Code of the City of Aspen, §13-98 1, 3, 4

United States Code, Title 28, §1257 ..... 6, 7

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article II, §30b of the Colorado Constitution provides:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have any claim of minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

## ORDINANCE PROVISIONS INVOLVED

Section 13-98 of the Municipal Code of the City of Aspen (1977) provides in pertinent part:

> Sec. 13-98. Discriminatory practices prohibited.
>
> (a) Definitions.
>
> (1) *Discrimination*: "Discrimination" or "to discriminate" means, without limitation, any

act which because of race, color, creed, religion, ancestry, national origin, sex, age, marital status, physical handicaps, affectional or sexual orientation, family responsibility, or political affiliation, results in the unequal treatment or separation of any person or denies, prevents, limits or otherwise adversely affects, the benefit or enjoyment of any person of employment, ownership or occupancy of real property or public services or accommodations. Such discrimination is unlawful and is a violation of this section, provided, however, that the physical condition of an existing building or structure shall not, of itself, constitute discrimination.

* * *

(b) *Discriminatory employment practices prohibited.* It shall be unlawful for any person who is an employer or employment agency, directly or indirectly, to discriminate against any employee with regard to application for employment, hiring, occupational training, tenure, promotion, compensation, layoff, discharge, or any other term or condition of employment except when based upon a bona fide occupational qualification.

(c) *Discriminatory housing practices prohibited.* It shall be unlawful for any person, directly or indirectly, to discriminate against or to accord adverse, unlawful or unequal treatment to any other person with respect to the acquisition, occupancy, use and enjoyment of any housing, including the sale, transfer, rental or lease thereof.

(d) *Discriminatory public services and accommodation practices prohibited.* It shall be unlawful for a person engaged in providing services or accommodations to the public to, directly or indirectly, discriminate against any other person by refusing to allow the full and equal use and enjoyment of the goods, services, facilities, privileges, advantages, including accommodations, and the terms and conditions under which the same are made available, or to provide adverse, unlawful, or unequal treatment to any person in connection therewith.

* * *

## STATEMENT OF THE CASE

On November 17, 1977, the City of Aspen adopted a comprehensive anti-discrimination ordinance prohibiting invidious discrimination in employment, housing and public accommodations within the city, including discrimination based upon affectional or sexual orientation. Municipal Code of the City of Aspen §13-98 (1977). The ordinance does not identify or classify homosexual, lesbian, or bisexual persons as a "suspect class" and equally prohibits discrimination against heterosexual individuals. Res. App. at A-1; see also, Pet. App. at C-4.

On November 3, 1992, a majority of the Colorado electorate passed a statewide ballot proposal commonly known as "Amendment 2"[1] which was intended to

[1] Article II, §30b, Colorado Constitution.

amend the Colorado Constitution so as to effect an immediate repeal of all state and local legislative, regulatory and administrative anti-discrimination measures protecting homosexual, lesbian and bisexual citizens from invidious discriminatory acts, including §13-98 of the Aspen Municipal Code. In addition to nullifying existing anti-discrimination protections, Amendment 2 also has the objective of stripping all elected officials and levels of government of their discretion and authority to adopt or enforce future legislation or regulations prohibiting discrimination against homosexuals, lesbians and bisexual individuals. In furtherance of that objective, Amendment 2 mandates a fundamental change in the traditional political processes historically utilized by citizens to initiate legislative measures in their interest so as to foreclose the local or statewide adoption of legislation protecting homosexual, lesbian and bisexual individuals from discrimination in employment, housing and public accommodations absent the consent of a majority of the Colorado electorate by way of the passage of a subsequent amendment to the Colorado Constitution.

On November 12, 1993, Aspen joined with several other parties in initiating litigation in state court challenging the constitutional validity of Amendment 2 and seeking to enjoin its implementation. Claiming that Amendment 2 violated guarantees to the equal protection of the law as provided under the Fourteenth Amendment to the Constitution of the United States, Aspen moved for preliminary injunctive relief on December 28, 1992. After a four-day hearing, the trial court entered an order on January 15, 1993, preliminarily enjoining the enforcement of Amendment 2, concluding that the measure infringed

upon a fundamental constitutional right and was likely unconstitutional. A trial on the merits was set for October 12, 1993.

On January 19, 1993, the petitioners herein appealed the trial court's order to the Colorado Supreme Court, which affirmed on July 19, 1993. In upholding the injunction, the court found that the right of citizens to participate in the process of government is a core democratic value and that the opportunity to participate on an equal basis in such process constituted a fundamental constitutional right guaranteed by the Equal Protection Clause. Pet. App. at A-10 and A-11. The court further held that inasmuch as Amendment 2 mandated a restructuring of the political and governmental processes for the purpose of imposing singular disadvantages and burdens upon homosexuals, lesbians and bisexuals, the amendment, to a reasonable probability, infringed upon the fundamental right of citizens to participate equally in the political process and must, therefore, be subject to strict judicial scrutiny. Pet. App. at A-29 to A-31.

Since the entry of the decision affirming the issuance of the preliminary injunction, petitioners have twice moved and failed to obtain a continuance from the trial court of the trial date[2] and, likewise, have failed in obtaining relief by way of mandamus and/or prohibition regarding the trial date from the Colorado Supreme Court.[3] The trial on the merits of the respondents' claims remains scheduled to commence on October 12, 1993.

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[2] August 6, 1993 and September 28, 1993.

[3] August 11, 1993.

## REASONS FOR DENYING THE PETITION

### THE DECISION CHALLENGED BY PETITIONERS DOES NOT CONSTITUTE A FINAL DECISION SUBJECT TO REVIEW UNDER SECTION 1257 OF TITLE 28 OF THE UNITED STATES CODE.

Section 1257 of Title 28 of the United States Code grants jurisdiction to the Supreme Court to review by way of writ of certiorari only "final judgments or decrees" rendered by the highest court of a State in which a decision could be had. The final judgment requirement generally precludes review of a state court decision where anything further remains to be determined by the state court. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945). While there are exceptions to the final judgment rule, *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 478, 479-484, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), such exceptions must not only involve a final state court judgment on the federal issue subject to review, but must be free of other federal issues needing resolution, thus, foreclosing the probability of piecemeal review with respect to the federal issues. *Flynt v. Ohio*, 451 U.S. 619, 622, 101 S.Ct. 1958, 68 L.Ed.2d 489 (1981); *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 612, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989).

The Colorado Supreme Court expressly noted in its ruling below that several federal claims and issues in addition to the equal protection claim that was the focus of the preliminary injunction proceedings remain to be heard and resolved in the trial court. See, Pet. App. at A-3 n.2. Similarly, neither the trial court nor the Colorado Supreme Court entered or intended to enter a final determination on the constitutional validity of Amendment 2

by their rulings. See, Pet. App. at A-31 and B-5. Contrary to the argument as put forth by the petitioners, the decision of the Colorado courts in issuing and affirming the preliminary injunction did not conclude the federal claims and disputes between the parties or preordain any given result in respect to their resolution. See, *Cox Broadcasting Corporation v. Cohn, supra,* 420 U.S. at 479. Granting the petition for certiorari at this stage of the proceedings between the parties would result in the kind of piecemeal appellate review proscribed by 28 U.S.C. §1257 and disfavored by the Supreme Court. *Compare, Flynt v. Ohio, supra,* and *Minnick v. California Department of Corrections,* 452 U.S. 105, 120-123, 101 S.Ct. 2211, 68 L.Ed.2d 706 (1981) with *Organization For A Better Austin v. Keefe,* 402 U.S. 415, 418 n.1, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971) and *Local No. 438 v. Curry,* 371 U.S. 542, 548, 83 S.Ct. 531, 9 L.Ed.2d 514 (1963).

## CONCLUSION

The ruling of the Colorado Supreme Court not being a final decision coming within the parameters of Section 1257 of Title 28 of the United States Code, the Supreme Court should deny the Petition For Writ Of Certiorari.

Respectfully submitted,

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## APPENDIX

Sec. 13-98. Discriminatory practices prohibited.

(a) Definitions.

(1) *Discrimination*: "Discrimination" or "to discriminate" means, without limitation, any act which because of race, color, creed, religion, ancestry, national origin, sex, age, marital status, physical handicaps, affectional or sexual orientation, family responsibility, or political affiliation, results in the unequal treatment or separation of any person or denies, prevents, limits or otherwise adversely affects, the benefit or enjoyment of any person of employment, ownership or occupancy of real property or public services or accommodations. Such discrimination is unlawful and is a violation of this section, provided, however, that the physical condition of an existing building or structure shall not, of itself, constitute discrimination.

(2) *Housing*: "Housing" means any building, structure, vacant land or part thereof during the period it is advertised, listed or offered for sale, lease, rent or transfer of ownership, and during the period while it is being sold, leased or rented.

(3) *Public services or accommodations*: "Public services or accommodations" means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages or accommodations to the public.

(4) *Person*: "Person" means any individual, firm, partnership, corporation, association, organization, unincorporated organization, labor union, government agency, incorporated society, statutory or common law trust, estate, executor,

administrator, receiver, trustee, conservator, liquidator, trustee in bankruptcy, committee, assignee, officer, employee, principal or agent, legal or personal representative, real estate broker or salesman or any agent or representative of any of the aforegoing.

(b) *Discriminatory employment practices prohibited.* It shall be unlawful for any person who is an employer or employment agency, directly or indirectly, to discriminate against any employee with regard to application for employment, hiring, occupational training, tenure, promotion, compensation, layoff, discharge, or any other term or condition of employment except when based upon a bona fide occupational qualification.

(c) *Discriminatory housing practices prohibited.* It shall be unlawful for any person, directly or indirectly, to discriminate against or to accord adverse, unlawful or unequal treatment to any other person with respect to the acquisition, occupancy, use and enjoyment of any housing, including the sale, transfer, rental or lease thereof.

(d) *Discriminatory public services and accommodation practices prohibited.* It shall be unlawful for a person engaged in providing services or accommodations to the public to, directly or indirectly, discriminate against any other person by refusing to allow the full and equal use and enjoyment of the goods, services, facilities, privileges, advantages, including accommodations, and the terms and conditions under which the same are made available, or to provide adverse, unlawful, or unequal treatment to any person in connection therewith.

(e) *Penalties and civil liability.* Any person who violates the provisions of subsections (b) through (d) hereof

shall be deemed guilty of an offense and upon conviction thereof shall be punished by a fine not exceeding three hundred dollars ($300.00) or imprisonment of not more than ninety (90) days or both such fine and imprisonment, at the discretion of the court. In addition, any person claiming to be aggrieved by an unlawful discriminatory act shall have a cause of action in any court of competent jurisdiction for compensatory damages and such other remedies as may be appropriate, including specifically the issuing of restraining orders and such temporary or permanent injunctions as are necessary to obtain complete compliance with this section. In addition, the prevailing party shall be entitled to reasonable attorney fees and costs.

(f) Whenever it appears that the holder of a permit, license, franchise, benefit, or advantage, issued by the City of Aspen is in violation of this section, notwithstanding any other action it may take or may have taken under the authority of the provisions of this section, the City of Aspen may take such action regarding the temporary or permanent suspension of the violator's City of Aspen business license, permit, franchise, benefit or advantage as it considers appropriate based on the facts disclosed to it.